No. 192.

Brief of Putnam for Appellant

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899

No. 192

The Steamship Benito Estenger

against

The United States of America

} Prize

BRIEF FOR THE CLAIMANT

HARRINGTON PUTNAM

Advocate

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1899.

The steamship Benito Estenger, Arthur Elliott Beattie, claimant, appellant, against The United States of America.	Prize.

Appeal from a sentence of condemnation of the United States District Court for the Southern District of Florida.

The *Benito Estenger,* a steamship of 370 tons gross and 244 net register, was captured by the United States auxiliary cruiser *Hornet* between 2 and 3 A. M. of Monday, June 27, 1898. She was brought into Key West and there libelled as prize of war. A sentence of condemnation was entered on December 7, 1898. The grounds of this decree appear in the opinion of the Judge which is printed in the appendix to this brief.

It appeared that the steamer had been built some fifteen years ago at Philadelphia, that she had been owned by Enrique de Messa, of the firm of Gallego, Messa & Co., of Santiago de Cuba, all of whom were Cubans. Before the war the *Benito Estenger* had been running coastwise and had been under the Spanish flag. Mr. Messa had returned from Europe in April. He had been an adherent of the Cuban cause. Naturally he was anxious to protect this vessel from interference by the Spanish. He swore in his test affidavit:

"That the said vessel up to about April 4th, 1898, had been running coastwise and under the Spanish flag; that about that time deponent came from Europe—he being a prominent sympathizer of the Cuban cause and many of his relatives being prominently connected with the Cuban insurgents—and having lost a great deal of his property during the Cuban war, and fearing that the said *Benito Estenger* might be seized by the Spanish Government and that he might thus lose her—on the second of June he got said vessel out of Cuba and into Jamaica, where he arrived June 4th, with intention of disposing of her immediately, that he placed the vessel in the hands of Mr. Orrett, an attorney and broker of Kingston, at the same time informing him

that he thought the vessel could be sold to the firm of Beattie & Co., whom he learned before leaving Cuba needed a larger vessel than the one already owned or used by them (the *Greenan Castle*) for bringing supplies from Jamaica to Cuba for a large number of Cuban families living on the sugar estate of the said Beattie & Co., near Manzanillo." (Record, p. 21.)

After arrival at Kingston the vessel was transferred to Arthur Elliott Beattie, a British subject temporarily residing at Kingston and a member of the firm of Beattie & Co, all British subjects, who have large estates at Media Luna, near Manzanillo.

The bill of sale is dated June 9, 1898 (Record, p. 48).

It was duly deposited with the Registrar of Shipping and a declaration of ownership made (p. 49), whereupon a formal British register for the steamer was issued.

Mr. Beattie went on board, took possession, and thereafter the steamer flew the British flag.

It did not appear how the consideration for this sale was paid, except that Mr. Messa had previously been indebted to Mr. Beattie and that a large part of this consideration was credited on this indebtedness (Messa, p. 22).

Mr. Beattie himself declined to state how the payments were made.

It will not be contended upon this appeal that all the interest of Mr. Messa in the *Benito Estenger* ceased on June 9, 1898. The transfer was obviously made to protect the steamer as neutral property from Spanish seizure. That Mr. Messa, however, still retained a beneficial interest after this sale and transfer of flags, and continued to act for the vessel as supercargo, has not been disputed.

The steamer loaded a cargo of flour and breadstuffs for Manzanillo. She left Kingston on June 23d, arrived at Manzanillo on the 25th, and landed her cargo. Some refugees had been booked as passengers for Jamaica, but the steamer was prohibited from taking them. She proceeded to sea at 2 A. M. of June 27th. Soon after, when off Cape Cruz she was captured by the *Hornet,* as already stated.

The decisive element of this case distinguishing it from other captures of Cuban vessels has not been stated. It was the employment, mission, and services to the naval authorities that the *Benito Estenger* had been procured to undertake through the active efforts of consul Dent of Kingston.

Consul Dent's Connection with the Voyage of the Benito Estenger.

The attention of the Court is specially requested to the active intervention of the official representative of the United States, and the subsequent breach of faith on the part of the naval authorities, in making this capture, after benefiting by the arrangements in their behalf with the owner of the vessel.

In the test-affidavit by Mr. Messa, sworn to on the 27th of July, is the following statement:

"That before the said steamer left Jamaica, deponent was requested by one Dr. Caminero, a member of the American consulate at Kingston, to visit the consulate, as the consul wished to discuss with deponent some important business—the American consul having got information by some means that deponent some time before had contemplated the building of docks in the harbor of Santiago, Cuba, and with that view had made or procured extensive drawings of the harbor depths of water in various parts, and other information that would be valuable to the American fleet, then operating in front of Santiago, the consul knowing deponent to be a Cuban and enthusiastic sympathizer for their cause.

"On the 17th or 18th of June, 1898, deponent went to the office of the American consul in Kingston, and, knowing that the said Arthur E. Beattie was a sympathizer with the Cuban cause, asked him to accompany him, which he did. That at the interview with the consul, deponent informed him, that he had with him in Kingston, Jamaica, the plan and soundings of the harbor of Santiago aforesaid; and on the 23d of June he again met the consul by appointment, Mr. Beattie being with him, and being familiar with the coast around Santiago, *he made and submitted plans,* and explained to the consul and marked out a place suitable for the landing of an armed force in Santiago Bay at the same time that the American forces were landing at Baiquiri. It was agreed between the consul and deponent—he being informed by Mr. Beattie that the steamer would sail shortly for Manzanillo, and shortly return to Jamaica from there—that on her return from Manzanillo to Jamaica, deponent would go up to Santiago and meet Admiral Sampson, and the consul would in the meantime advise Admiral Sampson if possible." (Record, p. 22.)

On the examination of Consul Dent he produced reluctantly, under call from claimant's counsel, a copy of his original letter

to Admiral Sampson of June 23rd, 1898, enclosing these plans and maps obtained from the *Benito Estenger.* In the course of the letter to Admiral Sampson he states regarding Messa:

"He is a member of this large firm at Santiago, the owner of considerable property. From my two interviews with him, I should judge him to be a man of no special prejudices, a business man, content to go along as quietly as possible, a man of intelligence, about sixty years of age.

"He offered voluntarily, as he offered these plans to me, to give any information that he could relative to the country around Santiago without compromising himself, and he evidently expects nothing in return but the prospect of peace and the resumption of his business. From his long residence in that country, he would, no doubt, be in a position to give much information to yourself and General Shafter.

"His vessel leaves to-morrow night for Montego Bay to Manzanillo, and *he has assented to my suggestion,* as follows: When he leaves Manzanillo he will be presumed to go to Trinidad to bring refugees to Jamaica, but he will come outside of the Keys, and stand off twenty miles from Cape Cruz due west, where a cruiser can pick him up, ostensibly detain his vessel for examination, take her in to the fleet, where you can interview him to any extent you desire, if you see fit.

"*The object of apparently capturing him will be to disarm suspicion on the part of the Spaniards, who would well know his vessel.* If you care to avail yourself of this plan you could send a vessel to the point named Wednesday night. Messa has made appointment for that place for Thursday morning, June 30th. You quite understand that in dealing with these people one is always more or less liable to imposition. I therefore make no recommendation of Messa to you. I simply give you the opportunity to get information perhaps of value, and to judge of the man for yourself, as I have done.

"*As to the cargo of this ship, it will go in the name of a British subject under the British flag; but I am told privately by the President of the local Junta, who has performed valuable services for me, that the proceeds of this cargo are to be forwarded to the Cuban government and troops through the Cuban agent in Manzanillo. Mr. Lay, on that ground asked me to give him a letter to any cruiser that might be met, but I, of course, declined.* Having regard to his services to me, however, I told him that I would advise you privately of his statement, and you could, of course, use your judgment as to whether you would pass the ship under the circumstances. I rather believe his statement that this is the fact, because he avers that, to avoid

the provisions being seized for the troops, they are to be sold before being landed from the ship.

I have the honor to remain, sir,

Your obedient servant,

(Signed) LOUIS A. DENT.

" Messa has the soundings to accompany his plan of Santiago, but they are in Cuba. I will endeavor to reach him by telegraph and impress my request casually made to bring them back with him if he can get them, though I fear they are in Santiago, where his home is." (*Record,* pp. 77, 78.)

Upon his examination, consul Dent admitted that he had first sought through Dr. Caminero to obtain these plans and information from Mr. Messa. He said:

" I have some recollection that Dr. Caminero informed me that Mr. Messa had in his possession some plans, and that I said to him, if that were the case, I should be very glad to get them. That these plans had relation to Santiago or the country thereabout." (Record, pp. 58, 59.)

" I have an impression that subsequently I spoke a second time to Dr. Caminero about these plans and asked him why he had not gotten them for me." (Record, p. 59.)

Edward George Orrett, also examined under commission to Kingston, stated that he was at the time the agent of the *Benito Estenger:*

" Mr. Dent asked me to let Mr. Messa know that he wanted to see him, and I told him that I would convey his message to Mr. Messa. This conversation took place at the United States consulate at Kingston in the early part of June." (Third Interrogatory, Record, p. 45.)

" After such conversation at the U. S. consulate I saw Mr. Messa and told him that consul Dent desired to see him at the consulate. I delivered the message in question, orally." (Fourth Interrogatory, Record, p. 45.)

The *direct* examination of consul Dent was before the enforced production of his letters, and showed him to be a partial, biased and inaccurate witness. Reviewing the statements in the test-affidavit, he proceeded to contradict them with a recklessness that had not anticipated the call for his official correspondence. This is one contradiction of the test-affidavit as an example:

"The fifth paragraph is untrue in the statement that the special reason making these plans desirable was because they exhibited a suitable place for landing troops in Santiago. Such a suggestion was never made either by Mr. Messa or myself" (p. 59).

In his letter of June 23d to Admiral Sampson, which he was made to produce the second day of his examination, consul Dent wrote:

"Mr. Messa also calls my attention to a fine little harbor about two miles to the westward of Santiago entrance, where you can get ten feet of water close up to shore *for the landing of troops.* He says Nunes knows the spot perfectly" (p. 78).

On the cross-examination of consul Dent on the first day he was asked:

"I put this matter to you, Mr. Dent, as a matter of good faith: that you had on the 14th written to Admiral Sampson, giving the name of this vessel; that you had afterwards received these plans and surveys of Santiago; that you had made the suggestion that there might be an appointment to confer with the Admiral and give him this information; that the vessel makes the voyage to Manzanillo that she had intended, and before she can arrive at the point she is captured. I would like to know what explanation you have of the capture after such an arrangement had been made? A. My answer is this: Mr. Messa came to me and asked me to give him some protection. I refused to give him a permit, as already stated, and it was suggested that I give him a letter. I refused to give him a letter to the Admiral, as I did not have strong faith in the good faith of Mr. Messa; and in order to test Mr. Messa, I agreed to this plan; that I said to him that if he wanted to go over there and make this trip, I would put it in his way to present his case to the Admiral personally, and then let the Admiral decide whether he could make the voyage; and that, in order to do so, I would write this letter direct to the Admiral, which I would not give to him, and he could make the voyage at his own risk and venture and take the Admiral's decision if he saw fit. Mr. Messa did not keep good faith, because he did not keep the appointment; went in to Manzanillo and was captured three days before the time set for the appointment. * * * I claim that the entire transaction was a breach of faith on Mr. Messa's part, as before stated. *I told him it would not be possible for him to carry a cargo(!)* because, in my judgment, the Admiral

would in no event permit cargo of that character to be landed in Cuba." (Record, p. 69.)

On the re-direct examination also on the first day consul Dent stated further:

"Q. At the time you were talking with Mr. Messa about meeting Admiral Sampson was it contemplated that he should go first into Manzanillo, or was he to go to the suggested point of meeting from Jamaica? A. From the character of the whole transaction, I should say that it was *not* contemplated that he should carry that cargo into Manzanillo." (Record, p. 71.)

Contrast this positive statement under oath with the consul's official letter written at the time, to Admiral Sampson, as follows, describing the cargo to be carried and then proceeding in detail:

"The vessel leaves to-morrow night for Montego Bay for Manzanillo, and he has assented to my suggestion as follows: *When he leaves Manzanillo,* he will be presumed to go to Trinidad to bring refugees to Jamaica, but he will come outside of the Keys and stand off twenty miles from Cape Cruz due west, where a cruiser can pick him up, ostensibly detain his vessel for examination, take her to the fleet, where you can interview him to any extent you may desire if you see fit. The object of apparently capturing him will be to disarm suspicion on the part of Spaniards, who would well know his vessel."

Instead of being a breach of faith, Messa and the claimant had too implicit faith in these assurances of the United States consul. It was plainly intended that the vessel was first to make a voyage into Manzanillo, discharge her cargo for the local Junta, come out, meet the Admiral, and supply such oral information as was needed to explain the plans and surveys.

The excuses set up by the consul for the capture are two-fold: First, that Messa improperly took a cargo *into* Manzanillo instead of first waiting outside for the rendezvous with the Admiral —a shifty pretense destroyed by his own official dispatch written on the very day of the final interview. Second, that a blockade which he elegantly termed a *de facto* one, had already existed at the Port of Manzanillo on the 20th of June as he had learned officially by letters from Admiral Sampson, and had notified the claimant. His idea evidently was that a technical breach of this imaginary blockade, if fastened on the claimant, might stand as

an excuse for the breach of faith on the part of the consul and the Government in subsequently seizing the ship.

Fortunately for truth, this last excuse was also disproved from the same official document which the consul was required to produce.

This letter of June 23d to the Admiral makes no mention of any blockade. The first letter intimating the intention to form a blockade is dated June 25th, two days *after the departure* of the *Benito Estenger.* Admiral Sampson then wrote:

"As soon as the vessels of light enough draft are available I hope to establish an effective blockade of the space between Cape Cruz and San Antonio." (Encl. No. 4, Record, p. 76.)

This letter was after the *Benito Estenger* had reached Manzanillo.

According to the President's proclamation, it was not till three days after this, and more than twenty-four hours after the capture of the *Benito Estenger,* that such a blockade was officially proclaimed at Washington. (See Appendix, p. 21.)

Confronted with these papers, the consul still sought to evade, and to support his statement by reference to imaginary verbal messages, by which he claims the advance information of the blockade might have reached him. He comes down finally to the last excuse, as follows:

"In my testimony of yesterday I believe I stated very positively that my warning to Mr. Messa as to the blockade was based upon letters from the Admiral advising me of the fact of the blockade. If, as might be, the letter numbered Exhibit C, from the Admiral, be the earliest letter which I had from the Admiral upon the subject, it stands as a matter of course that I could *not* have given my warning to Mr. Messa based upon letters from the Admiral. The reading of these papers has refreshed my memory somewhat. I am quite positive that I had information of the blockade previous to the date of the Admiral's letter. At that time I was in constant communication with the Admiral through letters and through verbal messages by means of the press despatch boats, which were frequenting Jamaica daily, and it may be my information of the blockade came through this source. In addition to this, I recall having some conversation with Commander Emory, of the U. S. S. *Yosemite,* who arrived in Kingston upon the date of the departure of the *Purissima Concepcion,* that is, June 16th, and I

remember distinctly discussing the matter of the blockade with him. It is my impression that Commander Emory told me at that time that the Admiral was establishing this blockade, and he asked me particularly again with reference to my suggestions to the Admiral previously as to the exact location and character of the blockade." (Record, pp. 72.)

The claimant's own account of the interview agrees in every particular with the documents:

"Previous to the sailing of the *Benito Estenger* for Manzanillo, Enrique de Messa, my supercargo, and myself had an interview with the United States Consul Dent, when Enrique de Messa gave the Consul tracings of the Harbor of Santiago de Cuba, and also an original plan of the Eastern provinces of the Island of Cuba. *Consul Dent then proposed* that Messa, with the ship, should meet Admiral Sampson after the cargo had been discharged at Manzanillo, and that the vessel, with this object, should be off Cape Cruz on the 30th June, 1898, for the purpose of meeting a United States man-of-war, which would convoy the vessel up to the fleet under the command of the Admiral, who was then blockading Santiago de Cuba, and there give Admiral Sampson certain information as to the approaches to the Harbor of Santiago. This, as owner of the *Benito Estenger,* I consented to, and impressed upon Messa the importance of keeping the appointment." (Record, p. 40.)

This detailed statement of testimony is needed to show the services given by, and arrangements entered into with, the owners of this vessel before her capture.

Consul Dent's unenviable attitude has this explanation. He was in a trying position, zealous to aid the naval forces. It was especially needful to get information regarding Santiago. These objects once attained, he became indifferent to the situation of those whose trust in his arrangements had brought about their capture. His subsequent position is that of a witness seeking to be freed from responsibility. In this motive he talked of a blockade five days before it existed, did not scruple to charge that the flour carried was ultimately delivered to Spaniards though shipped by the President of the local Cuban *junta,* and finally raises the issue of the British flag, although that fact was fully written to the Admiral. Although advised as to the transfer, at the time, Mr. Dent had made no protest or objection to the British authorities.

The learned District Judge (Honorable James W. Locke) decided there was no question of violation of blockade, as it had not been declared previous to the capture, that the transfer to Mr. Beattie had not been sufficiently made out, and that therefore Mr. Messa was still to be deemed the owner.

Continuing, Judge Locke said:

"Reaching this conclusion, it is claimed that Messa was a Cuban, a Cuban sympathizer, and had rendered valuable services to the United States Government, and was not liable to be so considered an enemy, as to subject his property to condemnation. The rights of the Cubans or of Cuban sympathizers, as contradistinguished from other Spanish subjects, are a difficult question, but one which it is considered must be determined by the political department of the Government. It is clearly within the province of the Executive to make a distinction between Spanish and Cuban property, or, even, when satisfied that the services of a Cuban have entitled him and his property to some recognition, but until there has been some such recognition by the political department of the Government, it is not considered that the courts can make any such distinction, and the property of any subject of Spain, when captured, can only be considered that of an enemy, notwithstanding the personal sympathies or personal services of the owner. Unquestionably Messa, the original owner, was at the time of the seizure a subject of Spain. It was therefore considered that the steamer was the property of an enemy, and a decree of condemnation was entered."

The claimant appealed and assigned error:

1. For that the Court held and decided that the *Benito Estenger* was lawful prize of war.

2. For that the Court failed and declined to hold that the *Benito Estenger* was not lawful prize of war.

3. For that the Court failed and declined to hold that the *Benito Estenger* was a neutral vessel lawfully owned and registered in the name of a British subject domiciled in Great Britain.

4. For that the Court failed and declined to hold that the steamship *Benito Estenger* was a British merchant ship duly documented and entitled to the protection of her flag.

5. For that the Court failed and declined to hold that the *Benito Estenger* was employed and engaged on a voyage by and on behalf of the local Cuban junta of Kingston for whom the steamer had carried a cargo from Kingston into Manzanillo.

6. For that the Court failed and declined to hold that said Cuban junta and its supporters were allies of the United States and that vessels employed by them are not lawful prize of war.

7. For that the Court failed and declined to hold that the *Benito Estenger,* when captured, was in the service of the United States, this claimant and her supercargo having furnished maps, surveys, and other important data of Santiago harbor to Admiral Sampson, and having arranged that the vessel should come to meet his fleet to furnish additional information to the Admiral.

8. For that the Court condemned, as enemy's property, the vessel thus employed in friendly offices to the forces of the United States (Record, pp. 25, 26).

The steamer *Benito Estenger* has been since appraised, and a stipulation for her appraised value taken by the Government in lieu of the vessel.

ARGUMENT.

I.—THE VESSELS OF CUBAN INSURGENTS, AND THEIR ADHERENTS, CANNOT BE DEEMED THE PROPERTY OF ENEMIES OF THE UNITED STATES.

The joint resolution of April 20th, 1898, declaring the people of Cuba free and independent, and directing the Executive if necessary to resort to armed intervention, decided their status as allies, and estopped our naval forces from capturing their vessels.

This right of capture against the Crown of Spain could be put forth only against subjects of that sovereign. Thus Grotius says, "Things are deemed taken from the enemy which are taken from his subjects."—"Hosti autem eripi consentur et

quæ subditis hostium eripiuntur." De jure belli ac pacis, lib. III cap. VI, II, 5.

When our declaration pronounces this sovereignty terminated, and that the Cubans are no more subjects of the enemy, how could the right of capture thereafter be enforced against the newly recognized belligerent?

The general proposition that Cuban merchant vessels are to receive that amity belonging to allies is not essential to this appeal, which rests on special facts. Its discussion is merely by way of introduction. The point is already before this Court in other cases.

Apparently Judge Locke thought this weighty matter was for the Executive alone, and that even after these positive Resolutions of Congress, the Federal Judges are powerless. Surely the interpretation of these resolutions is with this Court. By its sentence it can avert a grotesque inconsistency from our naval annals. It can prevent a great national mission, begun with professions of disinterested liberation, from reaching an ignoble end, in petty seizures and cheap enrichment from the shipping of our poor protégés. Saturn devouring his own offspring, as soon as born, is a repellant type of military intervention in the sacred cause of humanity.

II.—The capture cannot be sustained on the ground that the property taken was that of enemies of the United States.

In what respect had Messa, who had given up to the consul for Admiral Sampson his private papers, plans and drawings, some of which had been extracted from the Government archives, shown himself an enemy of the United States?

How had Arthur Beattie acted as an enemy of the United States, in turning over the ship that he had just purchased, to be used to convey information to the Admiral, and to aid in the operations then going on against Santiago?

Instead of enemies of the United States, the claimant of the vessel and his supercargo were furnishing the very means to Admiral Sampson and General Shafter to enter the Harbor of

Santiago, and terminate the war, perhaps earlier and more effectively, than they were afterwards able to do, through not having kept the consul's appointment.

Mr. Beattie compromised his own position as a neutral by thus aiding and assisting the United States in the prosecution of the war.

After the claimant had acquiesced in this earnest solicitation to meet the Admiral and explain the plans—solicitations evidenced by repeated requests to Dr. Caminero, followed up by a message through the ship's agent, Edward G. Orrett—after the consul had written to the Admiral that it was his own suggestion,—he has undertaken to say that this was a plan in which *he* was passive, and that Messa sought *him* out for this opportunity to hand over this information to the United States authorities!

These plans and original tracings were in Admiral Sampson's hands by the 25th of June. What use he has made of them does not appear. The confiding claimant, desiring honorably to assist the United States, is rewarded by the capture of his property, and, instead of the aid and support of the consul, finds that official seeking to repudiate the transaction, except so far as his own documents render it impossible to deny his participation.

Can this Court hold that these were acts of persons inimical and hostile to the interests of the United States? Had the war terminated otherwise, and Cuba been victoriously held by Spain, what would have been the position of Mr. Beattie and Mr. Messa? Their landed and other properties, of no inconsiderable value, would have been confiscated; they themselves liable to imprisonment, perhaps death. Such was the risk they ran. Are they now to be treated as enemies, and their property condemned, by the United States?

It is abundantly proved that the firm of Gallego, Messa & Co., the former owners of the *Benito Estenger,* were not Spanish in sympathies; and, although the Spanish flag had been flown by the vessel, it was by compulsion of Spain, and not by choice. This appears not only from the test-affidavit of Mr. Messa, but is confirmed by Mr. E. G. Orrett, who states:

"The firm of Gallego, Messa & Co., of Santiago de Cuba, of which Mr. Enrique de Messa is a member, have been old correspondents of my firm.

"Mr. Messa is a Cuban, and has always been a warm sympathizer of the Cuban cause, and has always been in favor of

Cuba being annexed to the United States of America" (Record, p. 46).

The test-affidavit of Mr. Messa was handed to Mr. Dent on his examination (p. 58) and the consul was asked to read it over, and criticise any parts of it that were not true. He had not a word of contradiction to Mr. Messa's statement as to his sympathy and prominent identification with the Cuban cause.

Mr. Messa's statement in his test-affidavit was criticised, or rather debated, by Mr. Dent, as follows:

"There is a statement in the first paragraph of this affidavit which I believe to be untrue. The statement is that the vessel was brought to Jamaica for the purpose of disposing of it. My belief is founded on my general knowledge of the case. Mr. Messa arrived in Kingston before Mr. Beattie, and therefore could not have come to Kingston for the purpose of disposing of his vessel to Mr. Beattie. Further, the vessel was not transferred to Mr. Beattie until after she was lying in the harbor of Kingston for two or three weeks, and until about the time of the decision of the British government in the case of the steamer *Purissima Concepcion*" (p. 58).

Here are three distinct statements of fact. Every one is wrong. Messa did not reach Kingston *before* Mr. Beattie. Both, coming by different vessels, arrived there on the same day, June 4th, and just five days afterwards was the sale—on June 9th. The *Purissima Concepcion* was detained long afterwards. She did not leave till Thursday, June 17th (See postscript letter Dent to Admiral Sampson June 21st, Record, p. 79).

But with all this recklessness, and with full secret information from the Cuban Junta, and evident familiarity with their leaders, Mr. Dent takes no issue with Mr. Messa's statement of his past loyalty and sacrifices for the insurgent cause.

"The essential question to be determined in war, in regard to the character of every person is whether he is a friend or an enemy. National character furnishes a safe test of friendly or hostile character in most cases, and the presumption arising from it does not require to be supported by any evidence of the conduct of the party. But the presumption arising from national character fails altogether if the party is in action, and his acts are at variance with the character of his nation." * * "But there is this difference between enemies *de facto* and enemies *de jure*, that former are enemies *sub modo* only, and in

reference to so much of their conduct as is hostile. *If they cease to act as enemies, the foundation of their hostile character is gone.*"

Travers-Twiss, Law of Nations, Rights and Duties in Time of War, §157 (London, 2d ed., 1875).

III.—THE CONDUCT OF MR. MESSA IN WITHDRAWING HIS SHIP FROM CUBA BY HIS SALE TO MR. BEATTIE, WAS LAWFUL, JUSTIFIABLE, AND THE ONLY MEANS OF PROTECTING THE VESSEL FROM SPANISH INTERFERENCE, AND FROM THE PENALTIES OF CAPTURE AS ENEMIES' PROPERTY.

At the outbreak of the war, it was the right and privilege of Mr. Messa to withdraw his property from Spanish control and to dispose of the vessel to a neutral. It was his duty to do this promptly without undue delay. There was no flag of Cuba recognized. It was natural to sell to a British subject, who was also his creditor. Because this was not directly for cash it has been erroneously considered fraudulent or merely colorable.

It is not law that such a sale must be for cash, even if made *imminente bello*, or even *flagrante bello*.

The *Ariel*, 11 Moore, P. C., 119.

In that case there was not only non-payment of a large part of the price, but there was an engagement to pay part of this purchase money out of the future earnings of the ship. The Privy Council quoted with approval from Lord Stowell, as follows:

"The captor has no access whatever to the original private understanding of the parties in forming such contracts. It is, therefore, unfit that he should be affected by them. His rights of capture act upon the property without regard to secret liens possessed by third parties. In like manner, his rights operate on no such liens where the property itself is protected from capture" (p. 138).

In the case of Batten *v.* The Queen, a vessel originally Russian, had been conveyed to parties in Antwerp, and was at the time under the Belgian flag. After capture restitution was

resisted, on the ground that the transfer was invalid. The Court, however, refused to set aside the title of the purchasers, and declared that secret liens of other parties could not defeat the legal title where the fact of neutral ownership appears. Chief Justice Cockburn said:

"It is obviously a very different thing to apply the same principle to a case where the Court, in pronouncing sentence, is obliged to start with the fact that the vessel is neutral property, and was, therefore, not liable to seizure. To say in such a case that, because the party whose claim is put forward may only have the legal title, while another has the beneficial interest, the vessel, though neutral property, must necessarily be condemned, is a proposition to which we must not be taken as giving our assent, though the facts of the present case do not render it necessary for us to pronounce judgment upon it."

11 Moore, P. C., 271, 287.

The United States District Court for the Southern District of New York (Judge Betts), had a case of attempted forfeiture of a vessel previously owned by a citizen of New Orleans but conveyed in part payment of a debt to a woman who was a British subject on May 25, 1861.

Judge Betts said:

"It is proved that she took the transfer of this vessel from a Mr. Leitch, then residing in New Orleans, and having also connection with a house in trade in Minatitlan, in Mexico, in part payment of a debt *bona fide* owing her from him, and that he, because of disaffection with the rebellion in Louisiana and being loyal in his sentiments to the Union, left New Orleans in the vessel."

The Court ordered the vessel acquitted as not subject to forfeiture.

The *D. F. Keeling,* Blatch. Prize Cases, 93.

IV.—This Court can do justice by ordering restitution.

It is the appropriate province of the Superior Prize Courts to consider, construe and give effect to the previous political declarations of the government. Lord Stowell often overruled

the narrow construction attempted to be enforced by the administrative officers of the Crown.

In the *Maria,* 6 C. Rob., 201, the Court thus examined and enlarged the scope of a diplomatic license granted to the people of Bremen, when the river Weser was under blockade.

The Prize Court is also the proper tribunal to determine whether in honor and good conscience the property should be condemned, considering the previous conduct of the claimants.

Honor will not allow a belligerent to commit the injustice of condemning the property of those who have acted as friends, even in the extreme case where their goods are on an enemy's ship.

Thus in France a reclamation was made regarding cargo on the ship *de Papenbourg des Cinq-Frères,* which had come from Riga. It appeared clearly that the vessel was enemies' property and therefore the cargo owned by Jean-Baptiste Ghyselen and Joseph Roche became subject to confiscation because loaded on an enemy's vessel. The arrêté declared the proofs offered by these cargo owners unavailing—

" Puisque cette cargaison seroit toujours confiscable, quel qu'en fût le propriétaire, des le moment qu'elle étoit chargée à bord d'un navire ennemi; Considérant, d'un autre côté, que les services rendus à la République par les réclamants en fournissant à ses approvisionnements, ayant paru aux representants du peuple près les armées du Nord et de Sambre et Meuse de nature à mériter que la cargaison que réclamant Ghyselen et Roche leur soit restituée, le comité pense qu' après la confiscation prononcée, il est de la générosité françoise de leur faire don et remise de cette cargaison sans toutefois tirer à conséquence," etc.

Since this cargo will be always confiscable regardless of its ownership, from the moment that it is loaded on an enemy's vessel. Whereas, on the other side, the services of these claimants to the Republic in furnishing supplies having appeared to the representatives of the people near the Northern armies and those of the Sambre and Meuse, as of a character to deserve that the cargo claimed by Ghyselen and Roche should be restored to them—the committee are of opinion that after the condemnation declared, it is of the liberality of France to decree a grant and restitution of this cargo, without, however, creating a precedent.

Lebeau, Nouveau Code des Prises, vol. 4, p. 64 (Paris, An. 9).

In the case at bar every party interested has rendered meritorious services to this Republic. Even Mr. Lay, who shipped the *Benito Estenger's* cargo, is certified by the consul as one "who has performed valuable services for me" (Dent, letter June 23d, page 78).

V.—THIS CAUSE DOES NOT CALL FOR ANY NICE DISCUSSION OF THE LAW OF DOMICILE, NEUTRALITY, RECOGNITION OF INSURGENTS, OR BLOCKADES.

A government which seizes vessels engaged in friendly offices, as was the *Benito Estenger,* is estopped from alleging that they are hostile, or to question the formalities of transfers. Apparently Lieutenant Helm acted in entire ignorance of the proceeding between the consul and the Admiral. The demand to be taken to the Admiral made by Mr. Messa to his captors, was naturally treated as a possible *ruse de guerre,* and refused.

It falls to this Court instead to exercise those powers of relief and restoration that undoubtedly would have been shown by the Admiral had an opportunity been afforded him.

The vessel should be restored.

HARRINGTON PUTNAM
Advocate for Claimant.

Jany. 3, 1900.

Appendix I.

U. S. DISTRICT COURT,

SOUTHERN DISTRICT OF FLORIDA.

The United States
vs.
Benito Estenger.
} Opinion.

In the case of the *Benito Estenger,* the Court said there was no question of a violation of the blockade, as none had been declared previous to the capture, but the question was as to the nationality of the actual owner at the time of the seizure. The presumption was against the *bona fides* of the sale made under the circumstances that were alleged in this case, where unquestionably the principal, if not the sole object, was an exchange of flags. This presumption, the Court said, had not been satisfactorily overcome by the testimony. The payment had not been shown clearly and honestly, as might have been done; the original owner had virtually continued in possession and had planned and directed the movements of the vessel, and appeared to have been the principal one interested. He made all arrangements with the consul in regard to where and when she would sail and the same master and crew remained on board, supplemented only by a nominal master, necessary under the English flag. The entire testimony failed to satisfy the Court that the alleged sale was not a colorable one, simply for the purpose of an exchange of flags, and that the actual title is not still in Messa, the original owner.

Reaching this conclusion, it is claimed that Messa was a Cuban, a Cuban sympathizer, and had rendered valuable services to the United States Government, and was not liable to be so considered an enemy as to subject his property to condemnation. The rights of the Cubans or of Cuban sympathizers, as contradistinguished from other Spanish subjects is a difficult question, but one which it is considered must be determined by the political department of the Government, said the Court. It is clearly within the province of the Executive to make a distinction between Spanish and Cuban property, or, even when satisfied that the services of a Cuban have entitled him and his property to some recognition, but until there has been some such recognition by the political department of the Government, it is not considered that the courts can make any such distinction, and the property of any subject of Spain, when captured, can only be considered that of an enemy, notwithstanding the per-

sonal sympathies or personal services of the owner. Unquestionably Messa, the original owner, was, at the time of the seizure, a subject of Spain. It was, therefore, considered that the steamer was the property of an enemy, and a decree of condemnation was entered.

A true copy of opinion pronounced in above entitled cause.

Attest: E. O. LOCKE,
Clerk.

[SEAL.]

Appendix II.

THE BLOCKADE.

The following is the official notice of the blockade as given to the Associated Press and first published in the *afternoon* papers of July *28th* and the morning daily journals of the 29th:

"EXTENDING THE BLOCKADE.

ANOTHER PROCLAMATION BY THE PRESIDENT.

The Southen Coast of Cuba from Cape Frances, Isle of Pines, to Cape Cruz, included; also San Juan, Porto Rico.

WASHINGTON, June 28.—The President *to-day* issued a proclamation extending the blockade of Cuba to the southern coast from Cape Frances to Cape Cruz, inclusive, and also blockading San Juan, Porto Rico. The proclamation is as follows:

Whereas, For the reasons set forth in my proclamation of April 22, 1898, a blockade of ports on the northern coast of Cuba, from Cardenas to Bahia Honda, inclusive, and of the port of Cienfuegos on the south coast of Cuba was declared to have been instituted; and

Whereas, It has become desirable to extend the blockade to other southern ports,

Now, therefore, I, William McKinley, President of the United States, do hereby declare and proclaim that, in addition to the blockade of the ports specified in my proclamation of April 22, 1898, the United States of America has instituted and will maintain an effective blockade of all of the ports on the south coast of Cuba, from Cape Frances to Cape Cruz, inclusive, and also of the port of San Juan, in the island of Porto Rico.

Neutral vessels lying in any of the ports to which the blockade is, by the present proclamation, extended, will be allowed thirty days to issue therefrom with cargo.

WILLIAM MCKINLEY,
President of the United States of America.

June 27, 1898.
By the President,
J. B. MOORE,
Acting Secretary of State."